IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 652 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

PINJARA HABIB MOHMED

Versus

PATHAN NISHAR AHMEDKHAN TALIBKHAN

Appearance:

MR YOGESH S LAKHANI for Petitioner

NOTICE SERVED for Respondent No. 1

MS SEJAL K MANDAVIA for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 19/02/99

J U D G E M E N T

1. This is tenant's revision under Section 29(2) of the Bombay Rent Act.

2. The facts giving rise to this revision are as under :

A Suit for eviction of the revisionist was filed

by the respondent No.1 on the ground that the disputed accommodation was let out to the revisionist on a monthly rent of Rs.65/- per month and Rs.4/- per month were charged as house tax, etc. The rent fell due from 1.3.1984. Accordingly notice was given on 27.4.1985 under Certificate of posting. Evasive reply of this notice was given by the revisionist. The notice was not complied with hence Suit for eviction, recovery of arrears of rent and mesne profits was filed.

3. The Suit was resisted on the ground that there was no agreement for payment of rent at the rate of Rs.65/- p.m. nor was there agreement for payment of Rs.4/- p.m. towards taxes. On the other hand the agreed rate of rent according to the defendant revisionist was Rs.25/- p.m. He also applied for fixation of standard rent. Dispute regarding standard rent was also raised in the written statement. Tender of rent by Money Order and consequent refusal by the landlord was also pleaded by the revisionist in his written statement. Validity of notice was also challenged.

4. The trial Court found that the notice was not legal and valid because it was not sent by Registered Post. However, on arrears of rent the trial Court found that the revisiuonist was in arrears of rent exceeding six months on the date of service of the notice which was not paid by him within a month of service of notice. Consequently Decree for eviction was passed.

5. An Appeal was preferred by the tenant revisionist which was dismissed. The Appellate Court, however, did not accept the finding of the trial Court that the notice was illegal because it was not served by Registered Post. It was also found by the Appellate Court that after the decree of the trial Court the suit accommodation was sold by the original landlord to Rajakmohmed Madakiya. He was, therefore, impleaded as respondent No.2.

6. Learned Counsel for the parties were heard.

7. The first contention of Shri Y.S. Lakhani representing the revisionist tenant was that because both the courts below found that the notice is invalid the decree for eviction could not be passed. I do not agree with this contention. The trial Court has erroneously observed that the notice under Section 106 of the Transfer of Property Act and the notice of demand could have been given only by Registered Post and since the notice was sent under Postal Certificate it was invalid. The Appellate Court has corrected this error of the trial

Court in its judgment and has rightly observed that it is not strictly required that the notice under Section 106 of the Transfer of Property Act must be sent by Registered Post. It can be sent by ordinary post to the party who is intended to be bound by it or be tendered or delivered personally to such party or to one of his family members or servant at his residence or if such tender or delivery is not practicable it be affixed to a conspicuous part of the property. In view of these alternative modes of service of notice u/s.106 of the T.P.Act the view of the trial Court that the notice could be served only by Registered Post A.D. is apparently erroneous. Service of notice was not disputed. Service of notice by sending the same under Postal Certificate is a valid service hence the notice cannot be said to be illegal.

8. The next contention has been that the decree for eviction under Section 12(3)(a) of the Bombay Rent Act could not have been passed because dispute of standard rent was raised in the reply notice given on 22.5.1985 and also in the written statement and through a seperate application dispute of standard rent was also raised. It was contended that the standard rent could not exceed Rs.25/- p.m. Examination of the written statement shows that contradictory stand was taken by the revisionist. He denied that there was agreement for payment of rent at the rate of Rs.65/- p.m. On the other hand he had set up Agreement for payment of rent at the rate of Rs.25/- p.m. The dispute of standard rent was not bonafide and it was so found by the lower Appellate Court in its judgment. The conduct of the defendant revisionist also shows that the dispute of standard rent was raised not in a bonafide manner and if such dispute is not a bonafide dispute the case could not be taken out of the ambit of Section 12(3)(a) of the Rent Act. The expression "And there is no dispute regarding the amount of standard rent " in Section 12(3)(a) of the Bombay Rent Act signifies that such dispute must be bonafide and not malafide. Further mere raising of imaginary dispute of standard rent is also not sufficient to take the case of the landlord out of the perview of Section 12(3)(a) of the Rent Act. Malafide on the part of the revisionist is reflected from his conduct. At no time he requested the trial Court that his seperate application Ex.9 for fixation of a standard rent be disposed of first. He also did not request the trial Court to fix the interim standard rent so that he may be able to deposit the same in court within the time permissible by Section 12(3)(b) of the Rent Act. It appears from the record that the trial Court passed an order directing the defendant to pay the

arrears of rent on or before 31.8.1986. At that time no request was made that the trial Court may specify the rate at which the rent is to be deposited or paid. Likewise on 31.8.1986 the defendant revisionist did not comply the trial Court's order at Exh.11 and moved an application Ex.21 giving undertaking that the arrears of rent would be deposited on or before 11.4.1986. That application was also allowed, but no deposit was made. On 14.8.1986 the trial Court struck off the defence of the defendant revisionist because the rent was not deposited by him in Court. Even after striking of defence no attempt or request was made by the revisionist before the trial Court that the standard rent be fixed so that he may be able to deposit the same in Court. Issues were framed on 30.1.1988 and thereafter since the defence was struck off the case proceeded and ultimately the decree for eviction was passed. Nothing was deposited till the judgment was delivered by the trial Court. Keeping in view these facts and events it can be said that the dispute of standard rent was not bonafide rather it was malafide. Some plea was taken that because latrine was demolished by the landlord the rent was liable to be reduced to Rs.25/- p.m., but in the absence of any evidence on this allegation the two courts below could not have reduced the agreed rent nor could have held that the standard rent could not exceed Rs.25/- p.m.

9. Since there was no bonafide dispute regarding standard rent the case obviously fell within the ambit of Section 12(3)(a) of the Rent Act.

10. So far as arrears of rent is concerned vague plea was taken by the revisionist that the rent was paid, but receipts were not issued. This stand is hardly acceptable because on the one hand the defendant was raising the dispute of standard rent and on the other hand he was alleging payment of rent. In the face of so called dispute regarding standard rent no tenant could have paid the rent without obtaining receipt. Consequently the theory of payment was rightly rejected by the two courts below. The rent was proved to be due with effect from 1.3.1984. The notice was given on 27.4.1985. At that time more than six months rent was due and payment or tender of rent to the landlord within a month of service of notice was neither alleged nor proved. Thus, the case was fully covered by Section 12(3)(a) of the Rent Act and the decree could be passed under the aforesaid section.

11. Learned Counsel for the revisionist in the last contended that in any case the defendant revisionist was

entitled to the protection of Section 12(3)(b) of the Rent Act inasmuch as he had deposited the entire rent at the rate of Rs.69/- p.m. in the lower appellate Court and had further deposited 14 months rent in excess. In support of his contention he has placed reliance upon an unreported judgment of this Court in Somabhai Kalidas Patel v/s. Babubhai, reported in 1986 G.L.H. (UJ) 22.

12. The only short point which now remains to be considered is wether on the facts and circumstances of the case the revisionist was entitled to protection of Section 12(3)(b) of the Act or not.

13. Section 12(3)(b) provides that in any other case no decree for eviction shall be passed in any such suit if on the first day of hearing of the Suit or on or before such other date as the Court may fix the tenant pays or tenders in court the standard rent and permitted increase then due and thereafter continues to pay or tender in court such rent and permitted increase till the suit is finally decided and pays cost of the suit as directed by the Court. There are two parts in this sub-section. The first is obligation of the tenant to deposit on the first day of hearing of the Suit the rent which includes arrears of rent. The second part is that the tenant should continue to pay or tender in Court the rent, etc. till the suit is finally decided. There was legislative amendment in 2nd part contained in Section 12(3)(b)(i) and the word "regularly" appearing in this Section was deleted by Section 2 of the Gujarat Amendment Act VII of 1985. This amendment has prospective effect and after this amendment the tenant is not obliged to continue to pay or tender in Court regularly the rent falling due during pendency of the Suit or Appeal. But so far as the first part contained in Section 12(3)(b) is concerned there has been no legislative amendment and as such the tenant is required to pay or tender in Court on the first day of hearing of the suit the rent which includes arrears of rent. The first day of hearing has been interpreted in number of cases to be the date on which the court applies its mind to determine the real controversy between the parties and generally the date of settlement of issues is considered to be the first date of hearing of Suit. In this case the issues were framed on 30.1.1986. Prior to that the defence was struck off by the trial Court on 14.8.1986. In between no attempt was made by the tenant to file revision to get the order striking off the defence set aside from the revisional court. Nothing was deposited till 30.1.1988 nor any amount was deposited till the Judgment was delivered by the trial Court. It was only in Appeal that the rent was

deposited. In my opinion, since nothing was deposited on the first date of hearing of the suit within the meaning of Section 12(3)(b) of the Rent Act, the decree for eviction could be passed even if the case was covered by Section 12(3)(b) of the Act.

14. The requirement of Section 12(3)(b) are mandatory and not directory. Strict compliance has to be made of the provisions to this Sub-section if the tenant wants to avail of its benefit. If on the other hand he fails to comply with the legislative mandate of depositing the rent including arrears of rent on the first date of hearing of the Suit he can not claim protection of this section simply by saying that the entire amount was deposited in the Appellate Court. The appeal is no doubt continuation of suit, but by no stretch of imagination it can be said that the first date of hearing of Appeal will be the date of first hearing of the Suit. In the case of Somabhai (supra) it was not considered whether the tenant has to deposit on the first date of hearing of the Suit the entire rent due on that date or not. The facts of the said case are also not discussed in the unreported judgment. The case seems to be distinguishable on facts. In this case the observation of the Court was that because the tenant had paid all the arrears of rent before the Judgment in Appeal it should be held that he was not in arrears of rent and as such the decree for eviction could not be passed. Since in this case it was not considered whether the tenant has to deposit the rent and arrears of rent due upto the first date of hearing, on the first date of hearing itself this unreported judgment can not render any assistance to the learned Counsel for the revisionist. Belated deposit of rent or excess rent in the Appellate Court under these circumstances cannot be said to be strict and substantial compliance of Section 12(3)(b) of the Rent Act. The Lower Appellate Court therefore committed no error in holding that the revisionist is not entitled to the protection of Section 12(3)(b) of the Rent Act. The Decree for eviction was therefore rightly passed by the lower Appellate Court.

15. There is thus no merit in this revision which is hereby dismissed. No order as to costs.

sd/-

Date : February 19, 1999 (D. C. Srivastava, J.)

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